

Issue: Group II Written Notice with Suspension (failure to follow policy);
Hearing Date: 08/08/17; Decision Issued: 08/23/17; Agency: DOC; AHO:
Sondra K. Alan, Esq.; Case No. 11049; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution
Department of Human Resource Management

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
IN RE: CASE NO. 11049

HEARING DATE: August 8, 2017
DECISION ISSUED: August 23, 2017

PROCEDURAL HISTORY

Grievant is a Lieutenant for a regional facility of Department of Corrections. On March 27, 2017, Grievant was issued a Group II Written Notice for failure to follow policy.¹ After a second step meeting on April 26, 2017 a response was given to Grievant. Grievant then requested an expedited hearing and made a timely request for review.² On June 29, 2017, a Hearing Officer was appointed. A Pre-Hearing Conference was scheduled for July 11, 2017. The hearing was scheduled for August 8, 2017 at the facility.

APPEARANCES

Agency Advocate
Agency Representative as witness
Two additional Agency witnesses
Grievant Advocate
Grievant as witness
Six additional Grievant witness

ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized under applicable policy)?

¹ Agency Exhibit 4

² Grievant Exhibit 3

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM § 5.8.

APPLICABLE LAW AND POLICY

The Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishes the procedures and policies for employment within the Commonwealth. It also provides the procedures for grievances.

Va. Code § 2.2-3005 sets forth the duties of and powers given to a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure.³ Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency’s disciplinary action.⁴ Implicit in the hearing officer’s statutory authority is the ability to determine independently whether the employee’s alleged conduct, if otherwise properly before the hearing officer, justified the discipline.⁵

Virginia Department of Corrections Operating Procedure 401.1⁶; Virginia Department of Corrections Operational Procedure 038.1⁷; Virginia Department of Corrections Operational Procedure 261.1⁸; Virginia Department of Corrections Operational Procedure 135.1⁹ and Offense Policy 13¹⁰ also establish the guidelines and procedures to which the Grievant is to follow for continued employment within the Department of Corrections.

FINDING OF FACTS

³ EDR Ruling #2012-9906 (October 10,2012)

⁴ *Id.*

⁵ *Id.*

⁶ Agency Exhibit 2

⁷ Agency Exhibit 3

⁸ Agency Exhibit 5

⁹ Agency Exhibit 6

¹⁰ Grievant Exhibit 15

After reviewing the evidence presented and observing the demeanor of each witness the Hearing Officer makes the following findings of fact:

On February 23, 2017 a group of four Offenders were on a road gang assignment located approximately three miles from the prison facility. One Correctional Officer was present to supervise the four men as they worked. At about 9:30 am a tree branch tossed down the hill by an Offender (A) accidentally struck another Offender (B) on the side of his head. The Offender's (B) hardhat was knocked off his head and his ear was cut by the tossed branch. Offender (B) stated he was startled and "saw stars".¹¹ The incident was reported by phone at 9:39 am by the Correction Officer to his Supervisor, the Grievant, who is a Lieutenant. Grievant asked the Correctional Officer to see if he could stop the bleeding at the ear and to call back. The Correctional Officer called the Grievant back at 9:51 am stating the ear had stopped bleeding.¹² The Grievant told the Correctional Officer to call again if needed. The Correctional Officer was not instructed to bring the other three Offenders or Offender (B) into the facility; to call the rescue squad; dispatch a nurse; or request assistance of other staff.

At 11:45 am the Correctional Officer called the Grievant again. The Grievant told the Correctional Officer to bring the work crew into the facility if the Correctional Officer felt the Offender's (B) injury warranted their return to the facility.¹³ However, Correctional Officer was told he would have to check the VDOT personnel as to whether or not to go back with the remaining three Offenders to the work site. At that time, Grievant became aware the Correctional Officer had let Offender (B) stay in the bus after the injury because of a headache. When Grievant became aware at 11:45 am that the Offender (B) had been in the bus, he told the Correctional Officer it was against policy to "split" the work gang, i.e. have three Offenders working at the site and one on the bus.¹⁴

Whether or not the Correctional Officer made Offender (B) leave the bus was not in evidence. The Correctional Officer and Grievant had no further discussion about the incident. The Grievant did not immediately report the accident to his Supervisor. The Grievant's Supervisor became aware of the incident at about noon and he too did not take any action.

The Correctional Officer brought the crew back at 2:40 pm. Offender (B) was checked by the facility nurse who was preparing to leave her shift when Offender (B) came in. There was not another nurse scheduled to be at the facility after 3:00 pm. The nurse proceeded with the examination. The appropriate neurological tests were done by the nurse, none of which were positive for a concussion. Offender (B) was given medication for his headache and was instructed to report any further discomfort. Offender (B) had no further problems.¹⁵ Grievant filed an incident report six hours after the incident at 3:29 pm.

¹¹ Grievant Exhibit 4

¹² Agency Exhibit 1

¹³ Grievant Exhibit 7

¹⁴ Grievant Exhibit 2

¹⁵ Grievant Exhibit 6

OPINION

Grievant was disciplined in his written notice for failure to properly investigate and report the incident citing Operational Procedure 261.1, Operational Procedure 038.1 and Offense Code 13. "Incident" and "Accident" are given definition in the respective Operational Procedures, "Medical Emergency" is not described. However, it would appear a medical emergency is an event that contemplates a rescue squad being called or a nurse being taken to the emergency site. The accident in question was not of such severity as to warrant calling a rescue squad.

Each of the several witnesses questioned stated in their years of service a rescue squad had never been called to a work site. The standard procedure was to treat a minor problem on site or bring the victim back to the facility for nursing care or summons personnel to remove the victim to the nearest hospital¹⁶.

Offender's (B) injuries could have resulted in a concussion, an event for which the Correctional Officer did not have training to assess or treat. Testimony of witnesses indicated they all had up to date First Aid training but First Aid training did not include assessment of head injuries.¹⁷

Even if during the 9:30 am to 10:00 am period Grievant did not take definitive action, at the 11:45 am call it should have been clear to Grievant that the work crew needed to be brought back to the facility. Correctional Officer considered Offender's (B) injury and headache to be of such extent that he permitted Offender (B) to stay on the bus by himself. This alone (staying on the bus) was a further concern as: (1) A work gang is not to be split up, i.e. all Offenders need to be in the same proximity for the Correctional Officer to observe the group; (2) The Correctional Officer found the injury significant enough to permit the Offender to be relieved from work.

The problem, however, is that the Operational Procedures cited apparently only addresses serious injuries. "Medical Emergency" is not given definition. It is obvious not all incidents are of the same level of concern. There is no directive as to how to handle incidents that don't require a rescue squad, when a call should be made, and who should be making the decision about the Offender's treatment. The distinctions necessary are not clearly described. However, common sense would consider Grievant's lack of action a wrong decision. Witness testimony affirmed the particular Correctional Officer on duty the day of the incident was known to be a poor decision maker. Also witnesses testified that having been confronted with an incident similar to the one stated they would:

- 1.) Take a description of the incident from the Correctional Officer present.

¹⁶ Witness Testimony on Record

¹⁷ Witness Testimony on Record

- 2.) Be responsible for making the decision about what to do with the information given to them.¹⁸

Operational Procedure 261.1¹⁹ actually is a directive intended to report and investigate the “**occurrence**” not the “**injured person**”. However, it does state the purpose of the Operating Procedure as: “This Operating Procedure establishes guidelines for insuring a reasonable safe and healthy environment for Department of Corrections employees, individuals visiting the department’s facility, and other persons entrusted in DOC care.”²⁰ The Agency has proven that Grievant permitted the decision for the Offender’s (B) care to be made by the Correctional Officer.

Operational Procedure 401.1²¹ gives direction for a “Medical Emergency” which does not apply to less serious injuries. The Correctional Officer, while trained in First Aid, had no expertise in diagnosing head trauma. The Grievant was aware Offender’s (B) injury was to his head. Grievant was aware Offender (B) was separated from the work crew to remain on the bus with a headache.

Operational Procedure 038.1 (F)(2)(g)²² does require reporting an injury but the timing is not required to be immediate. Grievant did report the incident but did not immediately report the incident to his Superior.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency’s disciplinary action. Implicit in the hearing officer’s statutory authority is the ability to determine independently whether the employee’s alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are consistent with law and policy... “the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating aggravated circumstances to justify the disciplinary action.”

This Hearing Officer believes this matter would have been better addressed by counseling Grievant. A written policy should be created for how and who should assess

¹⁸ Witness Testimony on Record

¹⁹ Agency Exhibit 5

²⁰ Agency Exhibit 5 –Operational Procedure 261.1 Page 1 “Purpose”

²¹ Agency Exhibit 2

²² Agency Exhibit 3 -Operational Procedure 038.1 (F)(2)(g) Page 9

an injury and specifically what action to take regarding the severity of the injury. However, the Hearing Officer is not a “super personnel officer”.²³ Unless the Hearing Officer finds arbitrary and capricious behavior on the part of the Agency in issuing the discipline, the Hearing Officer is bound by statute to proceed to uphold the Agency’s disciplinary action.

Grievant did engage in improper behavior by not properly attending to Offender (B). Grievant was aware of all the policies stated and did not properly investigate the incident. There is no evidence in testimony that the Agency’s decision was based on discrimination. The Agency stated in testimony they had reviewed Grievant’s long, exemplary service although no evidence of his past performance was submitted in evidence. Agency stated in testimony the failure of Grievant to recognize the possible seriousness of Offender’s (B) injury and to put full reliance on his subordinate was a serious matter

MITIGATION

Under Virginia Code § 2.2-3005, the hearing officer has the duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness.²⁴ If a hearing officer mitigates the agency’s choice of discipline, the basis for the mitigation shall be stated in the hearing decision.

A non-exclusive list of examples for Group I types of offenses include: Tardiness; poor attendance; abuse of state time; use of obscene language; disruptive behavior; conviction of a minor moving traffic violation while using a state-owned or public use vehicle; and unsatisfactory work performance.²⁵

Group II also has a non-exclusive list of examples for acts of misconduct of a more serious nature that significantly impact agency operations which include: Failure to follow supervisor’s instructions or comply with written policy; violation of a safety rule or rules (where no threat of bodily harm exists), leaving work without permission, failure to report to work without proper notice; unauthorized use or misuse of state property; and refusal to work overtime.²⁶ Group III has a more extensive list of examples but two that stand out for acts of misconduct of a most serious nature that severely impact agency operations would include: abuse or neglect of clients; and violating safety rules (where threat of bodily harm exists).²⁷

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

²³ *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (Quoting Rules for Conducting Grievance Hearings, VI(B))

²⁴ EDR Ruling # 2012-9906 (October 10, 2012)

²⁵ DHRM Policy 1.60 Attachment A: Examples of Offenses Grouped by Level (April 16, 2008)

²⁶ *Id.*

²⁷ *Id.*

When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

Agency stated in testimony that Grievant's long record of service with no previous disciplines was considered but the possibility of the Offender's well-being not being properly cared for was a significant factor in deciding to issue a Group II discipline with a three-day unpaid suspension. There is nothing to suggest that the Agency's handling of the Group II discipline was exceeding unreasonableness, nor is it required that an Agency exhaust all possible lesser sanctions or, alternatively, show that a Group II discipline was its only option.²⁸

DECISION

For the reason stated above, the Agency's issuance of the Group II discipline with three-day²⁹ suspension without pay is **UPHELD**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must

²⁸ EDR Ruling # 2012-9906 (October 10, 2012)

²⁹ Grievant Exhibit 3

refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

Sondra K. Alan, Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.